No. 24-____

IN THE

Supreme Court of the United States

AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN; FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT; JEFFREY LAX; MARIA PAGANO,

Petitioners,

v.

PROFESSIONAL STAFF CONGRESS/CUNY; CITY UNIVERSITY OF NEW YORK; JOHN WIRENIUS, in his official capacity as Chairperson of the New York Public Employee Relations Board; ROSEMARY A. TOWNLEY, in her official capacity as Member of the New York Public Employee Relations Board; ANTHONY ZUMBOLO, in his official capacity as Member of the New York Public Employee Relations Board; CITY OF NEW YORK; THOMAS P. DINAPOLI, in his official capacity as New York State Comptroller,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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July 19, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

The State of New York is prohibiting several professors, all but one of whom are Jews, from dissociating themselves from a union's representation to protest its anti-Semitic and anti-Israel conduct and other expressive activities. The question presented is:

Whether it violates the First Amendment for a state to prohibit individuals from dissociating from a union's representation to protest that union's expressive activities?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption identifies all parties to this action.

Because Petitioners are not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

1. *Goldstein v. Professional Staff Congress/CUNY*, No. 23-384, U.S. Court of Appeals for the Second Circuit. Judgment entered March 18, 2024.
2. *Goldstein v. Professional Staff Congress/CUNY*, No. 1:22-cv-00321, U.S. District Court for the Southern District of New York. Final judgment entered March 14, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Second Circuit (Pet.App. 1a–11a) is reported at 96 F.4th 345. The appellate court's order denying panel rehearing is reproduced at Pet.App. 49a–50a. The district court's opinion granting Respondents' motions to dismiss (Pet.App. 12a–46a) is reported at 643 F. Supp. 3d 431.

JURISDICTION

The Second Circuit issued its opinion on March 18, 2024, and denied a petition for rehearing en banc on April 22, 2024. Pet.App. 1a–11a, 49a–50a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, as well as relevant provisions of the New York Taylor Law, N.Y. Civ. Serv. Law §§ 204, 209a, are reproduced at Pet.App. 51a–61a.

INTRODUCTION

The core issue in this case is straightforward: can the government force Jewish professors to accept the representation of an advocacy group they rightly consider to be anti-Semitic? The answer plainly should be "no." The First Amendment protects the rights of individuals, and especially religious dissenters, to disaffiliate themselves from associations and speech they abhor.

The Second Circuit, however, answered "yes" to this question because it believed it was bound by the Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). It thought this because

the advocacy group styles itself as a union and its mandatory representation stems from a labor statute. This was error.

Knight did not involve a compelled speech and association claim. The question in *Knight* was whether faculty members had an affirmative right to participate in a public university's nonpublic meetings with a union. 465 U.S. at 273. The Court held they did not, reasoning that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id*. at 283. The petitioners here, six professors at the City University of New York ("CUNY"), do not want to participate in the university's meetings with their exclusive union representative, the Professional Staff Congress/CUNY ("PSC"). The Professors want to completely dissociate themselves from PSC's representation to protest its anti-Israel conduct and other failings. In other words, because PSC wants to boycott Israel, the Jewish Professors want to boycott PSC.

The State of New York is prohibiting the Professors from engaging in this expressive activity by forcing them to remain exclusively represented by PSC. This amounts to compelled expressive association under the First Amendment because it means PSC has legal authority to both speak and contract for the Professors. As the Court recognized in *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018), "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees" and inflicts "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 887, 916.

There is no reason to tolerate it in this context. *Knight* did not sanction a state forcing Jewish faculty

members who are ardent Zionists to accept the representation of a union that supports policies they consider anti-Israel, such as the "Boycott, Divestment, and Sanctions" (BDS) movement. Indeed, it defies credulity to believe this Court would hold such compelled expressive association to not even be worthy of First Amendment scrutiny, but mere rational basis review. Yet that is how lower courts have construed *Knight*.

The Court should correct the dangerous misapprehension among lower courts that *Knight* allows states to dictate that individuals must accept particular advocacy groups as their exclusive representatives. The Court should grant this petition to clarify *Knight* and make clear that the First Amendment protects individuals' right to dissociate themselves from advocacy groups that support policies contrary to their deeply held beliefs.

STATEMENT

A. Legal Background: Exclusive Representatives Are Mandatory Agents Vested with Legal Authority to Speak and Contract for Individuals

New York's Taylor Law provides that, when a union is certified by New York's Public Employment Relations Board ("PERB"), "it shall be the exclusive representative . . . of all the employees in the appropriate negotiating unit." N.Y. Civ. Serv. Law § 204. Unions vested with this extraordinary power have the "exclusive right to speak for all the employees in collective bargaining," *Janus*, 585 U.S. at 898, as well as the right to enter into binding contracts for those employees, *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); N.Y. Civ. Serv. Law § 201.

An exclusive representative's authority is "exclusive" in the sense "that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 585 U.S. at 887. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Allis-Chalmers*, 388 U.S. at 180.

This power creates a mandatory agency relationship between the union and employees that the Court has likened to that between an attorney and client or a trustee and beneficiary. *ALPA v. O'Neill*, 499 U.S. 65, 74–75 (1991). This agency relationship carries with it a fiduciary duty to employees. *See id*. However, "an individual employee lacks direct control over a union's actions taken on his behalf." *Teamsters, Loc. 391 v. Terry*, 494 U.S. 558, 567 (1990). Consequently, unions can engage in advocacy that represented individuals oppose. *See Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310 (2012). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

B. Facts: The Professors Are Forced to Accept an Advocacy Group They Abhor as Their Exclusive Representative

Avraham Goldstein, Michael Goldstein, Frimette Kass-Shraibman, Mitchell Langbert, Jeffrey Lax, and Maria Pagano ("Professors") are CUNY faculty members. Pursuant to New York's Taylor Law, CUNY and the

State Respondents[1] require the Professors to accept PSC as their exclusive representative. This means PSC has legal authority both to speak for the Professors and to enter into binding contracts on their behalf.

The Professors—all but one of whom are Jews and Zionists—want nothing to do with PSC. Pet.App. 75a. They oppose PSC's political positions and how it negotiates their employment terms and conditions. Pet.App. 4a. Most of all, the Jewish Professors detest PSC's positions on Israel. This includes PSC's support of the "BDS movement," which the Professors believe vilifies Zionism, disparages the national identity of Jews, and seeks to destroy Israel as a sovereign state.

The Professors' opposition to PSC crystalized in June 2021 when PSC adopted a Resolution supporting the BDS movement. Pet.App. 74a, 93a. The Professors "believe that this Resolution is openly anti-Semitic and anti-Israel," a belief supported by the Resolution's terms. *See* Pet.App. 74a. As a result of PSC's Resolution and subsequent conduct, the Jewish Professors have been ostracized on campus based on their identities, religious beliefs, and support for Israel. Pet.App. 69a–73a, 75a.

PSC has persisted in the wake of the October 7, 2023 terror attacks on Israel and subsequent campus protests against Israel. In an April 2024 press release, where PSC touted that it is "the union representing 30,000 City University of New York employees," PSC declared that it "joins fellow unionists and academics in

[1] "State Respondents" refers to John Wirenius, Rosemary A. Townley, and Anthony Zumbolo, in their official capacities as members of New York Public Employee Relations Board.

condemning the recent actions of Columbia University administration to suppress student protest . . . ."[2]

The Professors want to effectively boycott PSC to express their displeasure with its advocacy. They do not want PSC to represent them or speak for them. But New York's Taylor Law forbids the Professors from completely dissociating themselves from PSC. They are compelled to continue to accept PSC as their exclusive agent and spokesman.

C. Proceedings Below: The Lower Courts Hold *Knight* Forecloses the Professors' Claims

To dissociate themselves from PSC and its objectionable speech, the Professors filed suit and allege Respondents are violating their First Amendment rights by compelling them to associate with PSC, with PSC's speech, and with a mandatory association of CUNY staff. Pet.App. 62a. Despite finding the Professors' plight "undeniably sympathetic," Pet.App. 33a, the district court held that *Knight* foreclosed their compelled speech and association claims. Pet.App. 32a–33a.

On appeal, the Second Circuit affirmed in a per curiam opinion, holding, "The Supreme Court's decision in *Knight* forecloses [the Professors'] claims challenging PSC as their exclusive representative." Pet.App. 7a. In so doing, the Second Circuit joined other circuits that also construed *Knight* to foreclose First Amendment claims alleging individuals forced to accept an exclusive representative are compelled to

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[2] *Statement on the Arrest of Students Demonstrating at Columbia University*, PSC-CUNY (Apr. 22, 2024), https://psc-cuny.org/news-events/statementarreststudentsdemonstratingcolumbiauniversity/.

associate with that entity and its speech. Pet.App. 6a–7a n.3 (collecting cases).

The Second Circuit denied a petition for hearing en banc on April 22, 2024. Pet.App. 49a–50a.

REASONS FOR GRANTING THE PETITION

The First Amendment guarantees individuals a right to dissociate from expressive organizations that advocate for policies contrary to the individuals' religious, moral, or political convictions. The Court should take this case to clarify that *Knight* does not give states free license to quash that right for any rational basis whenever that organization is an exclusive union representative, as several lower courts have concluded.

Knight did not concern a situation where individuals sought to escape a union's representation. *Knight* did not address, much less resolve, claims for compelled speech and expressive association. *Knight* thus did not hold that states can force dissenting individuals to remain in a union for any rational basis. Indeed, such a holding would create a conflict between *Knight* and this Court's precedents concerning exclusive representation and the First Amendment scrutiny that applies to compelled expressive associations.

The lower courts' misconception of *Knight* threatens individual liberties that lie at the heart of the First Amendment. This includes the right of religious dissenters to disaffiliate themselves from organizations that are hostile to their faith. It also includes the right of individuals to choose what advocacy group, if any, speaks for them. The lower courts' mistaken belief that, under *Knight*, states can force anyone to accept an exclusive representative for any rational basis must be corrected by this Court.

Because the Professors' case presents an ideal vehicle for the Court to consider this conflict and craft a workable solution, this Court should grant certiorari.

I. The Professors Have the Right Under the First Amendment to Dissociate from PSC as an Act of Protest and Free Speech

The First Amendment's guarantee of "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 585 U.S. at 892 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). "The right to eschew association for expressive purposes is likewise protected" by the First Amendment because "'[f]reedom of association . . . plainly presupposes a freedom not to associate.'" *Id*. (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

The act of dissociating from a person or entity can itself be an affirmative expressive activity. It is a common way for individuals to express their displeasure with the conduct or positions of the person or entity being shunned.

The Court recognized the right of individuals to boycott entities to express a message in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982). In that matter, the NAACP organized a boycott of white-owned businesses to pressure a county government to accept integration-related demands. *Id.* at 889. The Court found that the First Amendment protected the NAACP's refusal to deal with the businesses in order to make a political point and to pressure the businesses to change their policies. *Id*. at 911. The Court further found it unconstitutional for a state to compel the NAACP to end its boycott.

The Professors want to engage in similar expressive conduct. They want to dissociate themselves from PSC

and its representation to protest its anti-Semitic positions, political agenda, and failings as a union. Pet.App. 69a–81a.

The State is suppressing the Professors' expressive activity by compelling them to remain exclusively represented by PSC and to remain part of its bargaining unit. As a result of New York's Taylor Law, PSC continues to have the right to speak and contract for the Professors, even though they want nothing to do with PSC. This amounts to compelled expressive association under the First Amendment.

An analogy proves the point. The Court has found that exclusive representation creates an agency relationship between a union and employee akin to that between a trustee and beneficiary and an attorney and client. *ALPA*, 499 U.S. at 74–75. The State of New York would violate the Professors' First Amendment rights if it prohibited them from severing their relationship with a trustee to protest its decision to boycott and divest from Israel. The State would also violate the Professors' rights by forcing them to retain a known anti-Semite as their attorney. The same principle applies to the State forcing the Professors to retain PSC as their bargaining agent notwithstanding their religious and moral objections to associating with this partisan advocacy group.

The Court's recent decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), supports this proposition. In *Moody*, the Court explained that the government violates the First Amendment when it compels an entity to associate with another party or its speech if that compulsion interferes with the entity's desired message. *Id*. at 2401–02. That is what is occurring here. The Professors want to express their displeasure with PSC by disaffiliating themselves from this

advocacy group. But the State is interfering with the Professors' expressive activity by forcing them to continue to accept PSC as their exclusive representative. This state-compelled association violates the Professors' First Amendment rights.

II. The Court Should Take This Case to Correct Lower Courts' Misreading of *Knight*

A. *Knight* addressed only the narrow question of whether individuals have a right to participate in nonpublic meetings with public officials.

Knight did not address, much less resolve, the Professors' claim that compelling them to accept a union as their exclusive representative compels them to associate with that union and its speech. *Knight* merely held that government officials are constitutionally free to choose to whom they listen in nonpublic forums.

The Court addressed a narrow issue in *Knight*: whether it is constitutional for a government employer to prevent nonunion employees from participating in its nonpublic meetings with union officials.[3] The opinion states that the "question presented in these

[3] The lower court's decision in *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 571 F. Supp. 1 (D. Minn. 1982), makes clear there were only three claims before that court: (1) that exclusive representation violates the non-delegation doctrine, *id*. at 3–5; (2) that agency fees unconstitutionally compel nonmembers to subsidize political activities, *id*. at 5–7; and (3) that it is unconstitutional for the college to bar nonmembers from participating in union "meet-and-negotiate" and "meet-and-confer" sessions, *id*. at 7–12. Conspicuously absent is any claim that exclusive representation compels speech and association in violation of the First Amendment.

cases is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273. The Court held it did not because "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283. The Court further reasoned that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 288. Consequently, the Court concluded that "[t]he District Court erred in holding that appellees had been unconstitutionally denied an opportunity to participate in their public employer's making of policy." *Id.* at 292.

That holding has no bearing here. The Professors do not allege they are being wrongfully excluded from CUNY's meetings with PSC. They are not demanding a seat at the bargaining table. They are not asserting they have a "constitutional right to force the government to listen to their views." *Id.* at 283.

Rather, the Professors assert their constitutional right not to be compelled to accept PSC as their agent for speaking and contracting with CUNY. *Knight*'s holding that the government can choose to whom it *listens* says little about the government's ability to dictate who *speaks* to the government for individuals.

Some lower courts have recognized that *Knight* is not directly on point on this issue. The Ninth Circuit in *Mentele v. Inslee* found that "*Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct" from a compelled representation claim, but it then declared *Knight* controlling anyway simply because it saw it as "a closer fit than *Janus*." 916 F.3d 783, 788 (9th Cir. 2019). The Sixth Circuit in *Thompson v. Marietta*

Education Association stated that "[e]ven assuming plaintiff's compelled-representation theory is technically distinguishable [from the claims made in *Knight*]," and even though "*Knight's* reasoning conflicts with the reasoning in *Janus*," the Court would still deem *Knight* controlling because "a cramped reading of *Knight* would functionally overrule the decision." 972 F.3d 809, 814 (6th Cir. 2020).

In short, *Knight* does not answer the question presented in this case. The Court's rejection of one constitutional challenge to one distinct aspect of exclusive representation does not mean that all other applications of exclusive representation are inherently constitutional. *Knight* is not so broad.

B. The lower courts' misinterpretation of *Knight* conflicts with Court precedents concerning exclusive representation and compelled expressive associations.

1. The lower court's mistaken belief that *Knight* held *sub silentio* that regimes of exclusive representation do not compel association cannot be squared with this Court's precedents concerning this type of mandatory association. The Court has consistently held that compelling individuals to accept an exclusive representative impinges on their rights.

In 1944, the Court in *Steele v. Louisville & Nashville Railroad Company* held this impingement gives rise to a duty of fair representation. The Court recognized that the union's exclusive representation authority "clothe[s] the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." 323 U.S. 192, 202 (1944). It also found that

"minority members of a craft are . . . deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." *Id*. at 200. To address this issue, the Court construed the Railway Labor Act to impose on exclusive representatives a duty to fairly represent all employees subject to their representation. *Id*. at 202–03.

In the decades after *Steele*, the Court reiterated that an exclusive representative's authority to speak and contract for nonconsenting employees restricts their individual liberties. In *Am. Commc'ns Ass'n v. Douds*, the Court recognized that, under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" and that "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." 339 U.S. 382, 401 (1950). In *Allis-Chalmers*, the Court recognized that exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." 388 U.S. at 180. In 2009, the Court in *14 Penn Plaza v. Pyett* held that exclusive representatives can contractually waive individuals' statutory rights without their consent and acknowledged "the sacrifice of individual liberty that this system necessarily demands." 556 U.S. 247, 271 (2009).

Most recently, in *Janus*, the Court stated not just once, but twice, that "[d]esignating a union as the employees' exclusive representative substantially

restricts the rights of individual employees." 585 U.S. at 887; *see id*. at 901 (similar). If that were not clear enough, the Court also held that requiring individuals to accept an exclusive bargaining agent is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id*. at 916. The lower courts' position that *Knight* reached opposite conclusions would bring *Knight* into conflict with *Janus* and make *Knight* an outlier in this Court's jurisprudence.

2. The lower courts' position would also place *Knight* at odds with this Court's precedents concerning compelled expressive association. Infringements on the "right to associate for expressive purposes" are subject to at least exacting scrutiny, under which a state must prove its conduct is justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. The Court has required, in a variety of contexts, that mandatory associations must satisfy this scrutiny. *See Boy Scouts of Am. v. Dale,* 530 U.S. 640, 658–59 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 577–78 (1995); *Rutan v. Republican Party,* 497 U.S. 62, 74 (1990); *Roberts*, 468 U.S. at 623 (citing seven earlier cases).

An exclusive representative is the epitome of a compelled expressive association.[4] The government is requiring individuals to accept a designated advocacy group as their exclusive agent for engaging in an

[4] A bargaining unit also is a compelled expressive association, albeit an artificial one, because it is a group of individuals forced together by the government for the expressive purpose of petitioning a public employer. *See* Pet.App. 85a–86a.

expressive activity—speaking and contracting with the government. A union's "exclusive right to speak for all the employees in collective bargaining," *Janus*, 585 U.S. at 898, necessarily associates those employees with their union's speech. That is the point of this mandatory association—to give a union the power to speak not just for itself or its voluntary members, but for everyone in a bargaining unit. *See Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987) ("The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union."). As the Eleventh Circuit recognized in *Mulhall v. Unite Here Local 355*, a union's status as an employee's "exclusive representative plainly affects his associational rights" because the employee is "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees. 618 F.3d 1279, 1286–87 (11th Cir. 2010).

Yet lower courts have construed *Knight* to hold that this type of compelled expressive association is not subject to First Amendment scrutiny, but mere rational basis review. *See, e.g.*, *Hill v. SEIU*, 850 F.3d 861, 866 (7th Cir. 2017). Relying on their view of *Knight*, the district court and Second Circuit did not apply any constitutional scrutiny to the egregious situation presented here. The courts believed that, under *Knight*, a state forcing Jewish Professors to accept the representation of a union they consider anti-Semitic raises no First Amendment concerns.

This interpretation of *Knight* cannot be correct. It defies this Court's precedents concerning compelled expressive associations. Indeed, it defies common sense to believe that the Court, when deciding in 1984 whether a public university can exclude nonunion faculty from its meeting with union officials, intended

to rule that the First Amendment is no barrier whatsoever to states forcing dissenting individuals to associate with exclusive representatives. The Court should take this case to make clear that *Knight* did not adopt such an untenable position.

III. The Question Presented Is Important Both for Individual Liberties and for the Polity

A. The Professors' religious and political beliefs compel them to act against the union. They should be free to do so.

1. The issue in this case has significant implications for a number of fundamental individual rights. This includes an individual's rights: to choose with whom to associate for expressive purposes, *see Roberts*, 468 U.S. at 623; to refrain from speaking, *see Janus*, 585 U.S. at 891–92; and to dissociate from organizations or causes to express opposition to them, *see Claiborne Hardware*, 458 U.S. at 907–09. The Second Circuit and other lower courts have misinterpreted *Knight* to give states a free hand to infringe on all of these rights whenever a union is involved.

Under their misconception of *Knight*, a state can force individuals to accept a union as their exclusive representative, give that advocacy organization the power to speak and contract for those individuals, and forbid dissenters from escaping this mandatory association if they object to its advocacy. And a state can do all this without having to satisfy First Amendment scrutiny.

These actions severely impinge on the speech and associational rights of dissenters, especially those with religious or moral reasons for wanting to dissociate from a union. Free exercise of religion "implicates more than just freedom of belief." *Burwell v. Hobby*

Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (Kennedy J., concurring). "It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Id.* at 737. The government interferes with that right by forcing individuals to remain part of organizations that act contrary to their religious principles.

That is the situation here. The Jewish Professors want to escape PSC representation primarily because of the union's advocacy for the BDS movement, which violates their religious commitment to Zionism. The Jewish Professors' antipathy to PSC has only grown as the union continues to advocate against Israel. *Supra* pp. 4–6. PSC is not alone amongst unions in supporting the BDS movement.[5]

It is important for the Court to establish that *Knight* does not deprive the Professors and other dissenters of their First Amendment right to dissociate from unions that pursue policies contrary to the individuals' religious, political, or moral convictions. No individual should be compelled to accept the representation of an interest group that advocates for policies the individual abhors.

2. While a decision to that effect would go far to protect the individual liberties of dissenting employees, it would not upend systems of collective bargaining. Under *Knight*, public employers could continue to meet and bargain with only one union if they so choose.

For example, if the Professors were allowed to escape PSC's representation, that would not stop

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[5] *Groups Question University of California Over Union BDS Resolution*, Brandeis Center, https://brandeiscenter.com/groups-question-university-of-california-over-union-bds-resolution/ (last visited July 16, 2024).

CUNY from bargaining only with PSC. The union would lack authority to speak and contract for the Professors, but it would remain the only faculty advocacy group that meets and bargains with CUNY officials. PSC could continue to speak and bargain for the roughly 30,000 individuals in the bargaining unit, minus only the six Professors and others who oppose associating with PSC. New York's system of labor relations could continue to function while accommodating dissenters' First Amendment rights.

B. States will have free rein to force individuals to accept mandatory agents if exclusive representation is subject only to rational basis review.

The Court also should take this case because of the staggering implications of the lower courts' expansive interpretation of *Knight*. It allows states to vest advocacy groups with exclusive authority to speak and contract for individuals for any rational basis. Unless corrected by this Court, states will be free to politically collectivize entire professions or industries under the aegis of a state-favored interest group.

This threat is not hypothetical. Relying on *Knight*, lower courts have held that states can force individuals who are *not* public employees, but who merely receive monies for their services from public programs, to accept exclusive representatives to petition states over those programs. The Seventh and Eight Circuits held, respectively, that Illinois and Minnesota could constitutionally impose an exclusive representative on independent providers who receive Medicaid payments for providing home-based services to persons with disabilities. *See Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Hill,* 850 F.3d at 864. Many of these providers are the parents or guardians of the persons

they serve. *See Harris v. Quinn*, 573 U.S. 616, 620–23 (2014). The First, Seventh, and Ninth Circuits similarly held the First Amendment to be no impediment to states designating exclusive representatives for home-based childcare providers. *See Mentele*, 916 F.3d at 785; *Hill*, 850 F.3d at 864; *D'Agostino v. Baker*, 812 F.3d 240, 243–44 (1st Cir. 2016).

There is no limiting principle to exclusive representation under the lower courts' understanding of *Knight*. Here, the Second Circuit believed that *Knight* required it to find no constitutional impediment to a state forcing Jews to be represented by an advocacy group they consider anti-Semitic.

The Court should disabuse lower courts of the notion that *Knight* gives states broad discretion to impose mandatory representatives on dissenting individuals. An individual's right to choose which organization, if any, speaks for him or her is a fundamental liberty protected by the First Amendment. *See Claiborne Hardware*, 458 U.S. at 907–09; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294–95 (1981). The government tramples on this liberty when it dictates who will be an individual's advocate in dealing with the government. "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790–91 (1988).

The Court thus cannot "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" or "'practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.'" *Harris*, 573 U.S. at 630

(quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id*.

The lower courts have approved such a device by wrongly interpreting *Knight* to allow the government to compel individuals to accept an exclusive representative for speaking and contracting with the government for any rational basis. It is imperative that the Court correct this error and make clear that this type of compelled expressive association is permissible only if it satisfies heightened First Amendment scrutiny.

IV. The Court Should Use This Case as a Vehicle to Clarify Its Holding in *Knight*

The time has come for the Court to provide lower courts with guidance on *Knight*. Seven circuit courts have now misread *Knight* to exempt regimes of exclusive representation from all First Amendment scrutiny. *See* Pet.App. 6a–7a n.3. There is no reason to wait for any further percolation of this issue amongst the lower courts. If the Court wants to correct this error, it should do so now.

This case is an ideal vehicle for resolving the question presented. The facts here are straightforward and stark. The case presents no thorny procedural or jurisdictional issues that could complicate review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 19, 2024